

Section therefore stays any act (or failure to act<sup>18/</sup>) by any party (including agencies of government such as the Commission), seeking to "exercise control" over the renewal expectancy by eliminating or destroying it.<sup>19/</sup>

There is no question that a debtor/licensee's interest in an FCC license is "property of the estate" protected by the automatic stay of Section 362(a) of the Bankruptcy Code. In Fugazy Express, Inc. v. Fugazy, 124 B.R. 426, 430 (S.D.N.Y. 1991), after the Chapter 11 case of debtor, Fugazy Express, Inc., was converted to Chapter 7, the trustee contracted to sell all the assets of the estate, including the debtor's FCC Taxicab Radio Service license, to Metromedia. Prior to the sale

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<sup>17/</sup> (...continued)

Other authorities respecting the broad scope of the concept of "property of the estate" under the Bankruptcy Code are: Terwilliger's Catering Plus, Inc., 911 F.2d 1168, 1171 (6th Cir. 1990) (liquor license is property of the estate), cert. denied, 111 S. Ct. 2815 (1991); In re Neibarger, 120 B.R. 21 (E.D. Pa. 1990) (same), aff'd and remanded, 934 F.2d 1300 (3d Cir. 1991); In re Baker Industries Corp., 57 B.R. 611, 622 (Bankr. S.D.N.Y. 1986) (development order allowing debtor to use county roads property of the estate); In re Hoffman, 65 B.R. 985 (D. R.I. 1986) (liquor license); In re Rocky Mountain Trucking Co., 47 B.R. 1020 (D. Colo. 1985) (dormant state certificates of public convenience and necessity are property of the estate); In re Gencarelli, 14 B.R. 751 (Bankr. D. R.I. 1981) (attempted revocation of liquor license violated automatic stay provision).

<sup>18/</sup> In Lincoln Savings Bank, FSB v. Suffolk County Treasurer (In re Parr Meadows Racing Ass'n), 880 F.2d 1540 (2d Cir. 1989), cert. denied, 493 U.S. 1058 (1990), the Second Circuit held that, under 11 U.S.C. § 362(a)(3), no affirmative act is required. See In re North, 128 B.R. 592 (Bankr. D. Vt. 1991) (state board of examiners stayed by filing of bankruptcy petition from permitting pre-petition suspension of a chiropractor's license to take effect).

<sup>19/</sup> Prudential Lines, Inc., Debtor v. PSB Steamship Co., 107 B.R. 832 (Bankr. S.D.N.Y. 1989), discussed infra.

agreement, William Fugazy, a principal of the debtor, obtained FCC consent and purportedly assigned the license to his son's company, Fugazy Limousine Ltd. Metromedia and the trustee commenced an adversary action against William Fugazy and Fugazy Limousine (the "Fugazy parties"), seeking cancellation of the transfer and damages. In a consent order issued by the bankruptcy court, the Fugazy parties admitted that they had violated the automatic stay, and the trustee was authorized and directed to perfect its sale of the license to Metromedia. When Metromedia, pursuant to the consent order, sought FCC consent to assign the license from the debtor to the trustee, so that the trustee could assign it to Metromedia, the FCC declined to grant its consent on the ground that, according to its records, Fugazy Limousine, not the debtor, was the licensee. Metromedia and the trustee then petitioned the FCC to revoke its consent to the assignment to Fugazy Limousine. The FCC declined, stating that the license had "cancelled" upon the debtor's cessation of operations at the time it filed its Chapter 11 petition.

Cross motions for summary judgment were thereupon filed in the bankruptcy court. The Fugazy parties argued that, upon cancellation of the license, the license had ceased to be property of the estate. The bankruptcy court rejected this argument, and granted summary judgment for the trustee and Metromedia. On de novo review, the district court affirmed, expressly holding that under Section 362(a) of the Bankruptcy Code, the FCC was stayed from cancelling the license without

first requesting relief from the automatic stay. The district court said:

The License was part of the Debtor's estate because of the broad definition of property under the Code. According to the Code, the commencement of a case in bankruptcy creates an estate, which includes property, wherever located and by whomever held, and, with certain exceptions not pertinent here, all legal and equitable interests of the debtor in property. 11 U.S.C. § 541(a)(1). The property of the estate includes tangible personal property, intangible property and causes of action. United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983).

Licenses subject to governmental regulation are part of a bankruptcy estate. In re Baker Indus. Corp., 57 B.R. 611 (Bankr. S.D.N.Y. 1986). The mere existence of state or federal regulation is insufficient to exclude an item as property of the bankruptcy estate. The License at bar is property of the estate created by the Fugazy bankruptcy. See In re Smith, 94 B.R. 220 (Bankr. M.D. Ga. 1988) (an FCC license became part of the estate upon filing chapter 7 petition); Barnstein v. R.C. Williams, Inc. (In re Rocky Mountain Trucking Co.), 47 B.R. 1020 (D. Colo. 1985) (a certificate enabling debtor trucking corporation to provide services as a common carrier was part of the estate and properly auctioned off after conversion from chapter 11 to chapter 7).

This holding does not conflict with the congressional mandate given the FCC, as contended by the Fugazys and Limousine. The purpose of the Federal Communications Act is to maintain control over and provide for the use of the channels of radio transmission, but "not the ownership thereof". 47 U.S.C. § 301 (1962 & Supp. 1990). However, the Act implicitly creates a property right in the license by providing "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301. See L.B. Williamson, Inc. v. Federal Communications Comm'n, 170 F.2d 793, 798 (D.C. Cir. 1948) (Although a radio broadcasting station license does not confer an unlimited and indefeasible property right, the right is limited in time and quality by the terms of the license, it is more than a mere privilege or gratuity, it is "a thing of value to the person to whom it is issued.").

124 B.R. at 430.

On the question of application of the automatic stay to the FCC, the district court in Fugazy said:

Section 362 of the Code operates as an automatic stay of all actions and proceedings against the debtor, or any act to obtain property of the estate. 11 U.S.C. § 362(a). There is an exception to the stay for a governmental unit to enforce that unit's policy or regulatory power. 11 U.S.C. § 362(b)(4). However, as indicated by the legislative history, that exception is to be read narrowly so as to permit governmental entities to protect the public health and safety. 124 Cong. Rec. H11,092 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 124 Cong. Rec. S17,409 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini). The revocation of a license by the FCC does not affect the health or safety of the public, so there is no exemption to the stay under this section of the Code.

Id. at 431.

Under the expanded concept of property contained in Section 541(a) of the Bankruptcy Code, the renewal expectancy of a debtor is as much property of the estate as the FCC license to which it pertains. In Prudential Lines, Inc., Debtor v. PSS Steamship Co., 107 B.R. 832, 839-43 (Bankr. S.D.N.Y. 1989), the bankruptcy court held that Section 362(a)(3) of the Bankruptcy Code precluded the parent of a debtor in possession from exercising its right to take a worthless stock deduction for the stock of the debtor because the taking of the deduction would destroy the debtor's net operating losses. The bankruptcy court first concluded that net operating losses for federal income tax purposes were property of the estate; it then addressed whether depriving the estate of the potential benefit of net operating loss carryovers by taking the worthless stock deduction would

constitute an "exercise of control" over property of the estate in violation of Section 362(a)(3) of the Bankruptcy Code.<sup>20/</sup>

The Prudential Lines court held that, by taking a worthless stock deduction, the parent exercised control over property of the debtor's estate, reasoning as follows:

[T]he control provision of § 362(a)(3) is to be defined by the underlying congressional purposes of preventing dismemberment of the estate and assuring orderly distribution.

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<sup>20/</sup> The bankruptcy court in Prudential Lines, Inc. distinguished cases apparently holding that government-granted privileges or licenses are not property of the estate:

In asserting that NOEs are not property of the estate, defendant relies on Pension Benefit Guar. Corp. v. Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983) and D.H. Overmyer Telecasting Co. v. Lake Erie Communications, Inc. (In re D.J. Overmyer Telecasting Co.), 35 B.R. 400 (Bankr. N.D. Ohio 1983). Braniff held that Federal Aviation Administration rules limiting air carrier operation to landing slots do not create property rights. 700 F.2d at 942. The Overmyer court held that a license issued by the Federal Communications Commission is not property. 35 B.R. at 401-03. Both cases failed to recognize that, in enacting § 541, Congress intended inclusion of interests, whether or not transferable, in its expansion of property of the estate. Overmyer, moreover, was decided prior to the Supreme Court's ruling in Whiting Pools that estate property is to be broadly defined and Braniff, although decided after the Supreme Court's decision, failed to cite it. Accordingly, this Court, following Barnstein v. R.C. Williams, Inc. (In re Rocky Mtn. Trucking Co.), 47 B.R. 1020 (D. Colo. 1985) (holding that a license is estate property) and applying Whiting Pools, so distinguished those cases and held in Baker Ind. v. Florida Land and Water Adjudicatory Commission (In re Baker Ind. Corp.), 57 B.R. 611 (Bankr. S.D.N.Y. 1986), that a debtor-in-possession's right to truck its products from its mine, although subject to state and local regulation, lies within the purview of property of the estate. 57 B.R. at 622.

107 B.R. at 840 n.16.

The claiming of a worthless stock deduction having the effect of terminating potential use of loss carryovers violates the first of those purposes. It dismembers the estate by eliminating a potential that may be of benefit to creditors. That the effect is due to the legal consequences of the act is of no importance. In re 48th Street Steakhouse, Inc., 61 B.R. 182 (Bankr. S.D.N.Y. 1986), aff'd, 77 B.R. 409 (S.D.N.Y. 1987), aff'd, 835 F.2d 427 (2d Cir. 1987), cert. denied, Rockefeller Group Inc. v. 48th Street Steakhouse, Inc., 485 U.S. 1035, 108 S. Ct. 1596, 99 L. Ed. 2d 910 (1988).

107 B.R. at 843. See also Drexel Burnham Lambert Group Inc., Debtors, 120 B.R. 724 (Bankr. S.D.N.Y. 1990) (prosecution before Chicago Board of Trade of claims against proceeds of pre- and post-petition sales of membership seat by the debtors held barred by automatic stay); Brown Transport Truckload, Inc., 118 B.R. 889 (Bankr. N.D. Ga. 1990) (petition to state public service commission to block sale of a bankrupt competitor's Certificate of Convenience and Necessity held barred by automatic stay; extensive discussion of authorities).

The foregoing authorities lead inescapably to the conclusion that Tak's renewal expectancy constitutes property of the estate. Accordingly, Commission action or inaction herein eliminating or destroying the expectancy would violate the automatic stay of Section 362(a) of the Bankruptcy Code. A comparative hearing in which Tak could not prove and obtain the benefit of its renewal expectancy most certainly would eliminate or destroy its expectancy. It follows that the Commission is stayed from action or inaction denying Tak credit for its renewal expectancy.

3. Failure to credit Tak's renewal expectancy, if it resulted in denial of Tak's renewal, would also constitute an unlawfully discriminatory refusal to renew a bankruptcy debtor's license.

Section 525(a) of the Bankruptcy Code provides, in pertinent part:

[A] government unit may not . . . refuse to renew a license . . . [of] a person that is . . . a debtor under the Bankruptcy Act . . . solely because such . . . debtor is . . . a debtor . . . under the Bankruptcy Act.

It is clear therefore that the FCC, a governmental unit, cannot lawfully deny renewal of Tak's licenses solely because Tak is in bankruptcy.<sup>21/</sup> In In re Exquisite Services, Inc., 823 F.2d 151 (5th Cir. 1987), the Fifth Circuit held that the Air Force was precluded by Section 525(a) from declining its option to renew a contract that was, in the court's view, a franchise, because the franchisee had filed a Chapter 11 petition.

It is always arguable, and difficult to disprove, that a governmental unit's refusal or failure to renew a license or franchise of a debtor in bankruptcy was not "solely because" of the bankruptcy status of the debtor. That consideration has convinced one court to conclude that all such actions in which the fact of a bankruptcy filing appears to have played a significant role are proscribed by Section 525(a) of the Bankruptcy Code. In re Metro Transportation Company, Debtor, 64 B.R. 968, 975 (Bankr. E.D. Pa. 1986). In this case, Tak's

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<sup>21/</sup> See Public Service Co. of New Hampshire, Debtor, 90 B.R. 575, 579 n.4 (Bankr. D. N.H. 1988) (Nuclear Regulatory Commission precluded from denying approvals of the Seabrook Nuclear power plant "simply because [the licensee] is in reorganization").

bankruptcy status, and the resulting likelihood that control of Tak will not be the same in the renewal period as in the past, is the sole reason any question arises as to whether Tak is entitled to the renewal expectancy. Accordingly, denial of renewal because of a failure to credit Tak's renewal expectancy would fall squarely within the proscription of Section 525(a).


**V. CONCLUSION**

Wherefore, for reasons set forth herein, it is respectfully requested that the Commission act expeditiously on the pending Consolidated Petition to Dismiss or Deny and, if any hearing is necessary, promptly designate a hearing calling for a comparison between Tak, with full opportunity to prove and obtain the benefit of its renewal expectancy, and Shockley.

Respectfully submitted,

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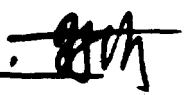
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March 23, 1993

**CERTIFICATE OF SERVICE**

I, Frank J. Martin, Jr., hereby certify that I have this 23rd day of March 1993, caused a copy of the foregoing "Consolidated Petition for Special Relief" to be delivered via first-class United States mail, postage paid, or hand delivery to the following:

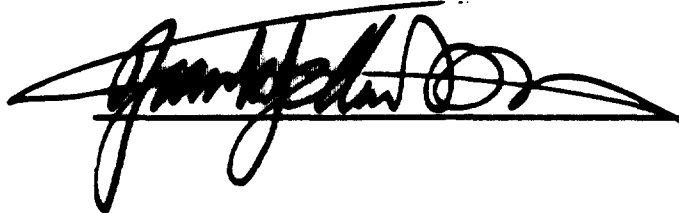
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## **CERTIFICATE OF SERVICE**

I, Tracie R. Ivey, hereby certify that on this 22nd day of July, 1994, I caused a copy of the foregoing "Comments of Tak Communications, Inc." to be served by hand delivery and by first-class United States mail, postage prepaid to the following:

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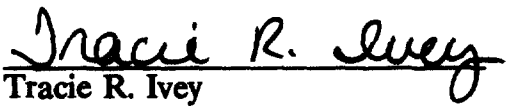
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